United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2082

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FOR THE SECOND JUDICIAL CIRCUIT

NO. 76-2082

JOSEPH FIORE,
PETITIONER-APPELLANT,

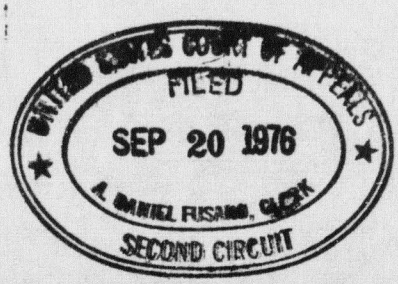
-VS-

UNITED STATES OF AMERICA,
RESPONDANT-APPELLEE,

B
P/S

REPLY BRIEF FOR PETITIONER-APPELLANT

JOSEPH FIORE
U.S. PRISON
ATLANTA GEORGIA
30315



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Petitioner-appellant (hereinafter appellant) demonstrated in his main brief that the District Court erred when it accepted a plea of guilty in 1957 by failing to advise the defendant as to the constitutional rights which he was waiving and by further failure to determine whether or not the defendant understood the complete nature of the charges.

Appellant refers this Court to Gillespie v. United States, 376 F.2d 414 (6th Cir. 1967), where the Sixth Circuit Court of Appeals rejected a similiar writ of habeas corpus from a prisoner who had already served his federal sentence and was then serving another sentence; the court stated at page 414:

> "Appellant is no longer confined as a result of the sentence he attacks, nor was it used as a predicate for his current habitual criminal sentence

> under which he is confined in a New York State Prison. Any benefit to him from success in this motion is most speculative."

It is the contention of the Government that appellant stands in no better light than did the petitioner in Gillespie, supra, by the assertion that "Although appellant was of course in no sense barred from making the application giving rise to this appeal, the substantial lapse of time between the entry of his plea and his present claim of constitutional infirmity casts some doubt upon his good faith and credibility (Brief for the United States of America, at page 4, n.1). To attempt finding, as did the Government, that the instant appeal has resolved itself into the question of credibility, is at best, stretching the facts of this case to the extreme.

All the cases cited in the Brief for the United States of America have nothing to do with the plea as it was entered in 1957. At the time the guilty plea was entered in the instant cause the principles of law which controlled the validity of a waiver of constitutional rights was perhaps best described by the United States Supreme Court in Van Moltke v. Gilles, 332 U.S. 708, 68 S. Ct. 316 92 L. Ed. 309 (1948), wherein the Court stated:

> "To be valid such a waiver must be made with an apprehension of the nature of the charge, the statutory offenses included thereunder, possible defense to the charges and circumstances in mitigation thereof and all other facts essential to a broad understanding of the whole matter."

Thus, the Van Moltke court in 1948 expressed with particularity what it had declared to be the duty of a Federal court to satisfy that a guilty plea was being understandingly entered. See Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

In the years to follow the Van Moltke and Johnson opinions have been developed into a rationale of cases dealing with the waiver of principals. In other cases too numerous and well known to warrant individual citation it has been held in every Federal Circuit that knowledge of the full range of allowable punishment to which a defendant subjected himself by entering a guilty plea was merely one essential principal of the understanding required for certification that such plea was voluntarily entered.

The Government, throughout its brief, argues the usual doctrine of " . . . failure to allege facts sufficient to entitle relief, or to a hearing on the issues he raises." The appellant relies on the official court record in the instant cause which clearly reflects the failure of the trial court to satisfy its duty to see that appellant was entering his guilty plea with a complete understanding of the consequences he faced as direct result of his guilty plea.

The burden of proof is now on the Government to show "on the record" that appellant's guilty plea was entered voluntarily and with a complete understanding of the whole matter. Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 88, 4 L. Ed. 2d; White v. Maryland, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193; Jackson v. Denno, 378 U.S. 368; Miranda v. Arizona, 384

U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694; United States v. Wade, 388 U.S. 218 18 L. Ed. 2d 1149, 875 S. Ct. 1926 (1967).

For the reasons stated above, and in the main brief, the judgment of the District Court should be reversed and remanded with directions that the sentence imposed be set aside, and that appellant be allowed to plead anew.

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CERTIFICATE OF SERVICE

I, Joseph Fiore, certify that I have this 14th day of September 1976 served a copy of the foregoing Reply Brief For Petitioner-Appellant to the following named by placing same in the U.S. Mail:

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